KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

THE McPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100
WASHINGTON, D.C. 20005

(202) 682-3500

TELECOPY NUMBER
(202) 682-3580

425 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 836-8000

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067
(213) 788-1000

ADMIRALTY CENTRE
TOWER I, 32ND FLOOR
18 HARCOURT ROAD
HONG KONG
(852) 865-7676

SQUARE DE MEEÛS 30
1040 BRUSSELS, BELGIUM
(322) 514-4300

WRITER'S DIRECT DIAL NUMBER

(202) 682-3526

November 25, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-3
RM-7874 and RM-7958

Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and four copies of his Reply To Opposition To Motion To Strike in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: _____
Irving Gastfreund

Enclosures

No. of Copies rec'd 0 + 4
List A B C D E

DOC #12077544

RECEIVED
NOV 25 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of Section 73.203(b) | ) | MM Docket No. 92-3 |
| Of The Commission's Rules | ) | RM-7874 and |
| Table of Allotments | ) | RM-7958 |
| FM Broadcast Stations | ) | |
| (Prineville and Sisters, Oregon) | ) | |

TO: Chief, Mass Media Bureau

## REPLY TO OPPOSITION TO MOTION TO STRIKE

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, pursuant to Section 1.45(b) of the Commission's Rules, hereby replies to the Opposition To Motion To Strike filed in this proceeding on November 20, 1992, on behalf of the licensees of certain radio stations operating in the Bend, Oregon, area (hereinafter collectively referred to as "Petitioners")[1]

## I. Introduction

On November 18, 1992, Martin filed with the Commission a Motion To Strike, in which he demonstrated that the Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding was untimely and therefore not cognizable by the Commission on its purported "merits". In his Motion To Strike, Martin requested that the Bureau summarily strike the Petition For Reconsideration without consideration.

---

[1] The Petitioners included the following broadcast licensees: Central Oregon Broadcasting, Inc. (licensee of KBND, Bend, Oregon; and KLRR, Redmond, Oregon); Redmond Broadcast Group, Inc. (licensee of KPRB and KSJJ, Redmond, Oregon); Highlakes Broadcasting Company (licensee of KRCO and KIJK-FM, Prineville, Oregon; JJP Broadcasting, Inc. (licensee of KQAK, Bend, Oregon); Oak Broadcasting, Inc. (licensee of KGRL and KXIQ, Bend, Oregon); Sequoia Communications (licensee of KICE, Bend, Oregon); and The Confederated Tribes of the Warm Springs Reservation of Oregon (licensee of KTWS, Bend, Oregon; and KTWI, Warm Springs, Oregon).

On November 20, 1992, the Petitioners filed their joint Opposition to Martin's Motion To Strike. The Petitioners therein contend that this channel allotment rulemaking proceeding is not a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules, that the deadline for the filing of Petitioners' Petition For Reconsideration was therefore not controlled by Section 1.4(b)(3), and that, therefore, the Petition For Reconsideration was timely filed. Alternatively, the Petitioners argue that, even if the Commission were to hold that Section 1.4(b)(3) of the Rules controls the reconsideration deadline in this proceeding, such a holding may not properly be enforced against the Petitioners.

For the reasons set forth below, the Petitioners' contentions are devoid of merit. The Petition For Reconsideration should be summarily stricken without consideration as untimely.

## II. Argument

The Petitioners are simply wrong in their contention that this proceeding is not a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. The Commission adopted Section 1.4(b)(3) of the Rules in Amendment Of The Rules Regarding Computation of Time, 2 FCC Rcd 7402 (released December 15, 1987). The Commission therein stated as follows with respect to the purpose of the new Section 1.4(b)(3):

> "[W]e have added a new subsection 1.4(b)(3) which clarifies the date of public notice for rule makings of particular applicability. For further information about the applicability of this subsection, see Declaratory Ruling, 51 Fed. Reg. 23059 (June 25, 1986)."
>
> 2 FCC Rcd at 7402.

In the Declaratory Ruling, supra (a reference to which is incorporated in the express language of Section 1.4(b)(3)), __ FCC 2d __, 60 RR 2d 524 (1986), the Commission stated, in pertinent part, as follows:

> "Rules of particular applicability ... are adopted after notice and comment procedures but are not required to be published in the Federal Register. See 5 U.S.C. §

552(a)(1)(D): American Broadcasting Companies, Inc. v. FCC, 682 F.2d 25, 31 (2d Cir. 1982). The Commission may decide, however, that Federal Register publication is desirable in some instances .... [Q]uestions have arisen whether rule making decisions which adopt rules of particular applicability are controlled by § 1.4(b)(1) [in which public notice is triggered by the date of publication in the Federal Register] or by § 1.4(b)(2) [in which public notice is triggered by the release date of the decision]. In the future, the Commission will indicate in its decisions if a rule of particular applicability (or a summary thereof) is to be published in the Federal Register. Where the decisions specify Federal Register publication, the Federal Registration publication date will trigger the date upon which public notice is given (i.e., the procedure will be identical to that set forth in § 1.4(b)(1). In all other cases, § 1.4(b)(2) will govern, even if the Commission subsequently decides upon Federal Register publication. This will permit interested parties to determine, upon release of the decision, whether the date of public notice is to be triggered by the release date or by the date of Federal Register publication. ... In the future, ... rules of particular applicability will be governed by § 1.4(b)(1) only when the decisional document itself specifies Federal Register publication. This will prevent any unnecessary uncertainty."

51 Fed. Reg. at 23060, 60 RR 2d at 525.

The Petitioners purport to rely on American Broadcasting Companies, Inc. v. FCC, 682 F.2d 25 (2d Cir. 1982) -- a decision cited by the Commission in its Declaratory Ruling, supra. In point of fact, the Court's decision in American Broadcasting Companies, Inc. v. FCC supports Martin's position in this case. The Court in American Broadcasting Companies, Inc. held as follows:

"The APA [i.e., the Administrative Procedure Act] distinguishes between rules of 'general applicability' and rules of 'particular applicability'. See 5 U.S.C. § 551(4). Under the APA, 'substantive rules of general applicability' are required to be published in the Federal Register. 5 U.S.C. § 552(a)(1)(D). Further, Section 553(d) provides in pertinent part that '[t]he required publication ... of a substantive rule shall be made not less than 30 days before its effective date.' The APA, however, makes no provision for publication of rules of particular applicability.

"The legislative history of the APA confirms that decisions in agency ratemaking proceedings such as the establishment of a utility's allowable rate of return are rules of particular applicability and as such are free from the publication requirement. Section 3(a)(3) of the APA, the predecessor of Section 552, 5 U.S.C. § 1022(a)(3) (1964), required every agency to publish in the Federal Register 'substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law.' Thus, as recognized in the Attorney General's Manual on the Administrative Procedure Act at 22 (1947), Section 3(a)(3) was not intended to apply to 'particularized rulemaking' such as ratemaking:

"This exemption for 'rules addressed to and served upon named persons in accordance with law' is designed to avoid filling the Federal Register with a great mass of particularized rule making, such as schedules of rates, which

> have always been satisfactorily handled without general publication in the Federal Register.
>
> "The phrase 'substantive rules adopted as authorized by law' refers, of course, to rules issued by an agency to implement statutory policy. Examples are the Federal Power Commission's rules prescribing uniform systems of accounts and proxy rules issued by the Securities and Exchange Commission.

"This section of the APA was subsequently amended to its present form as part of the Freedom of Information Act. Pub.L. No. 89-487, 80 Stat. 250 (1966). The proviso 'but not rules addressed to and served upon named persons' was deleted from the statute. However, the legislative history indicates that the amendment was intended merely to clarify, rather than change, which rules were required to be published in the Federal Register. United States Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 10 (1967); H.R. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965). The Senate committee that formulated Section 552 of the APA stated:

> "In Section 2 of the Administrative Procedure Act, rules are defined in such a way that there is no distinction between those of particular applicability (such as rates) and those of general applicability. It is believed that only rules, statements of policy, and interpretations of general applicability should be published in the Federal Register; those of particular applicability [are] legion in number and have no place in the Federal Register and are presently excepted but by more cumbersome language.

"S. Rep. No. 1219, 88th Cong., 2d Sess. 4 (1964) (emphasis added). See also Note, The Judicial Role in Defining Procedural Requirements for Agency Rulemaking, 87 Harv. L. Rev. 782, 788-89 (1974).

"Thus, ratesetting, including the setting of a rate of return percentage, is a rule of particular applicability. Such a pronouncement, although it impacts upon the public, does not 'so directly affect[] pre-existing legal rights or obligations', Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977), as to require publication in the Federal Register. [Footnote omitted, emphasis in original.]"

682 F.2d at 31-32.

Thus, the Court in American Broadcasting Companies, Inc. v. FCC made clear that the term "rule makings of particular applicability" encompasses far more than merely proceedings to establish a common carrier's rate of return or its schedule of tariffed rates, and the Petitioners' suggestions to the contrary are devoid of merit. Indeed, the Court of Appeals made clear that the term "rulemakings of particular applicability" applies to the multitude of notice and comment rulemaking proceedings which, although arguably impacting on the public, do not so directly affect preexisting legal rights or obligations as to require Federal Register publication.

Unquestionably, the instant channel allotment rulemaking proceeding is a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. The Mass Media Bureau's October 7, 1992 Report and Order in this proceeding substituted Channel 281C1 in lieu of Channel 281A at Sisters, Oregon, and modified Martin's construction permit for Radio Station KPXA(FM) to specify operations on the higher class channel -- i.e., on the very same channel (Channel 281) on which the station had already been authorized. The Mass Media Bureau's Report and Order in this proceeding did not allot any new channels which would be made available for applications by interested members of the public. Under these circumstances there is no rational basis for concluding that this channel allotment rulemaking proceeding/license modification proceeding is anything other than a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules.

In this latter connection, it should be noted that the Commission has held as follows with respect to channel allotment rulemaking proceedings:

> "Sections 73.202(b), 73.504 and 73.606(b) of the Commission's rules contain the FM and TV tables of assignments. ... However, the tables were not designed to be saturated. That is, new communities and/or channels could be added from time to time as needed. Because the tables themselves are part of the Commission's rules, rule making is required to amend the relevant table by the addition of a new community with its assigned channel or the addition of a new channel to a community already on the table but without an unoccupied channel. Approximately 150 new requests to amend the tables are filed each year. Generally, once it has been established that the proposed station location is a community and the proposed channel meets all the Commission's minimum mileage separation requirements, the request is granted. Rarely is there any interest in the matter beyond the directly affected parties. As is apparent from the foregoing, the process by which the Commission routinely amends the tables maintains the same procedural safeguards as other rule makings, but these individual cases are concerned only with a very limited number of communities and/or parties. In fact, in most cases, only one community and party is involved. It therefore appears that rule making proceedings involving amendments to the tables do not involve substantial impact on a significant number of entities. [Emphasis added.]"
>
> Certification That Sections 603 And 604 Of The Regulatory Flexibility Act Do Not Apply To Rule Making To Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 84 FCC 2d 791, 792 (1981).

Thus, the Commission itself has expressly recognized that channel allotment rulemaking proceedings are "rule makings of particular applicability". Indeed, it is difficult to imagine any proceeding that would better qualify as a "rule making of particular applicability" than would a channel allotment rulemaking proceeding/license modification proceeding, particularly where, as here, the proceeding did not result in allotment of any new channels which would be made available for applications by interested members of the public.[2]

Nonetheless, the Petitioners argue, in this regard, that the public at large has an interest in channel allotment rulemaking proceedings, even where, as here, no one may file a competing expression of interest in an FM permittee's co-channel or adjacent-channel upgraded facility. The Petitioners contend, in this connection, that, in any channel allotment rulemaking proceeding, a member of the public might desire to argue that the proposed allotment would not serve the public interest. Similarly, the Petitioners urge that the allotment of an upgraded channel entails the necessity for greater protection requirements that every FM allotment petitioner, applicant, permittee, and licensee must observe. Opposition To Motion To Strike at 4.

These arguments are simply make-weight and are substantively arid. The fact that the allotment of an upgraded channel might have some preclusive effect on other broadcast technical facilities or that some member of the public might seek to file a pleading in opposition to a proposed allotment, is not sufficient to convert a channel allotment rulemaking proceeding into a rulemaking of

---

[2] The Court of Appeals has recognized that channel allotment rulemaking proceedings involve "resolution of conflicting private claims to a valuable privilege". Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959). This holding bolsters the conclusion that channel allotment rulemaking proceedings/license modification proceedings are "rule makings of particular applicability", particularly where, as here, the Commission merely upgrades an existing licensee's or permittee's channel and does not allot any new channels for applications.

general applicability. In point of fact, the same arguments raised by the Petitioners apply to any application filed by a broadcast licensee seeking a modification of technical facilities. Yet, no one would seriously argue that application proceedings are rulemakings of general applicability. Moreover, the same arguments raised by the Petitioners could well be raised in support of the proposition that common carrier rate of return and tariff proceedings are "rule makings of general applicability". Indeed, it is manifest that the public at large is more dramatically impacted by overall increases in a common carrier's rate of return and increases in a common carrier's tariffed rates than by any channel upgrade allotment rulemaking proceeding. Yet, the Petitioners concede, as they must under applicable precedent, that common carrier rate of return rulemaking proceedings and tariff proceedings are one type of "rule making of particular applicability". Opposition To Motion To Strike at 3. What the Petitioners steadfastly appear unwilling to recognize is the fact that common carrier rate of return proceedings and tariff proceedings are not the only types of "rule making of particular applicability". Indeed, as noted above, Congress has recognized that rulemakings "... of particular applicability [are] legion in a number and have no place in the Federal Register..." S. Rep. No. 1219, 88th Cong., 2d Sess. 4 (1964), cited approvingly in American Broadcasting Companies, Inc. v. FCC, supra, 682 F.2d at 32.

While the Petitioners are correct in their conclusion that channel allotment proceedings are subject to notice and comment procedural requirements, the Petitioners are incorrect in their suggestion that channel allotment rulemaking proceedings are designed to adopt substantive rules of general applicability. Opposition To Motion To Strike at 3. In order to constitute a "substantive rule ... of general applicability" which is required to be published in the Federal Register pursuant to 5 U.S.C. § 552(a)(1)(D), the substantive rule must "... so directly affect pre-existing legal rights or obligations ... [or be] ... of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence..." Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977). See also Lewis v. Weinberger, 415 F.Supp. 652 (D.N.Mex.

1976); United States v. Hayes, 325 F.2d 307, 309 (4th Cir. 1963). Plainly, the results of FM channel allotment rulemaking proceedings/license modification proceedings do not meet these standards. Stated otherwise, such proceedings do not result in the formulation of substantive rules that must be used by members of the public "... as a guide in the conduct in their day-to-day affairs". United States v. Hayes, supra, 325 F.2d at 309.

The Petitioners contend that the Commission has "consistently" held that it is the date of publication in the Federal Register of an FM allotment Report and Order that triggers the deadline for filing of requests for reconsideration of a channel allotment Report and Order. Opposition To Motion to Strike at 3. In support of this contention, the Petitioners cite three cases: Knoxville, Tennessee, et al, 78 FCC 2d 1208, 1210 (1980); Clinton, North Carolina, et al., 6 FCC Rcd 5866 (Assistant Chief, Policy and Rules Division, Mass Media Bureau, 1991); and Randolph, Vermont, et al., __ FCC Rcd _ , __ RR 2d __ (unpublished letter ruling of Chief, Policy and Rules Division, Mass Media Bureau, June 5, 1992). Notwithstanding the Petitioners' contentions to the contrary, these cases do not mandate that the deadline for filing petitions for reconsideration in this proceeding was triggered by the date of Federal Register publication of the Mass Media Bureau's October 7, 1992 Report and Order in this proceeding.

The decision in Knoxville, Tennessee, et al., supra, inapposite to the present proceeding, since that decision was released on June 10, 1980 -- i.e., 6 years prior to the date of release by the Commission of its Declaratory ruling, __ FCC 2d __, 60 RR 2d 524 (1986), 51 Fed Reg. (June 25, 1986), and 7-1/2 years prior to the date upon which Section 1.4(b)(3) of the Commission's Rules became effective.[3] Thus, Knoxville, Tennessee, et al., does not provide any basis for any

---

[3] As noted above, Section 1.4(b)(3) was adopted by the Commission in Amendment of the Rules Regarding Computation Of Time, 2 FCC Rcd 7402 (1987). A copy of the text of that Report and Order was published in the Federal Register on December 30, 1987. See 52 Fed. Reg. 49159 (December 30, 1987). Under Paragraph 9 of the Report and Order, the new Section (continued...)

determination as to the scope of and applicability Section 1.4(b)(3) of the Commission's Rules and is thus inapposite to the present case.

In Clinton, North Carolina, et al, supra, the Assistant Chief of the Policy and Rules Division of the Mass Media Bureau dismissed a late-filed petition for reconsideration of the Report and Order of the Policy and Rules Division in MM Docket No. 89-18, 6 FCC Rcd 4377 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1991). In dismissing the petition for reconsideration, the Policy and Rules Division noted that the petitioning party had acknowledged that its petition was late-filed. 6 FCC Rcd at 5866. The Policy and Rules Division further noted, in passing, that the Report and Order in the proceeding had been published in the Federal Register on July 22, 1991, but the petitioner had failed to file its reconsideration request until August 29, 1991. Id. Thus, Clinton, North Carolina, et al., did not decide the issue of whether Section 1.4(b)(3) applied to the reconsideration request in that proceeding, since: (a) the reconsideration petition would have been late-filed regardless of whether the deadline for filing the reconsideration petition were triggered by the date of release of the Report and Order or by publication of the Report and Order in the Federal Register; and (b) the petitioner had acknowledged that its petition was late-filed. Furthermore, the underlying Report and Order in Clinton, North Carolina, et al., 6 FCC Rcd 4377 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1991) allotted a new FM channel for applications by interested members of the public. See 6 FCC Rcd at 4379 - 4380. Such action was not taken by the Mass Media Bureau in its October 7, 1992 Report and Order in this proceeding. Hence, arguably, the proceeding in Clinton, North Carolina, et al., was of greater concern to the general public than the instant proceeding.

---

[3](...continued)
1.4(b)(3) of the Rules became effective immediately upon publication of the Report and Order in the Federal Register on December 30, 1987.

The unpublished letter ruling of the Chief of the Policy and Rules Division of the Mass Media Bureau in Randolph, Vermont, et al., supra, dismissed a late-filed petition for reconsideration filed with respect to the Policy and Rules Division's Report and Order in MM Docket No. 89-487, 6 FCC Rcd 1760 (Policy and Rules Division, Mass Media Bureau, 1991). That Report and Order was released March 28, 1991. See 6 FCC Rcd at 1760; the Report and Order was published in the Federal Register on April 2, 1991. See 54 Fed. Reg. 47689 (April 2, 1991). The petition for reconsideration in Randolph, Vermont, et al., was not filed with the Commission until May 4, 1991, and the petitioner acknowledged that its reconsideration request was late-filed. Rather, the petitioner attempted to justify the late filing. Under these circumstances, it was not necessary for the Policy and Rules Division to reach the issue of whether Section 1.4(b)(3) of the commission's Rules applied with respect to establishment of the deadline for the filing of the reconsideration petition in Randolph, Vermont, et al. Indeed, not surprisingly, the reconsideration decision in Randolph, Vermont, et al., fails even to mention, much less discuss, Section 1.4(b)(3) of the Commission's Rules. In light of the foregoing, any comments made, in passing, by the Policy and Rules Division in its reconsideration letter ruling in Randolph, Vermont, et al., with respect to the deadline for the filing of a petition for reconsideration in that proceeding, must be viewed as mere dicta and cannot be properly viewed as any decisional precedent in the present proceeding with respect to the scope and applicability of Section 1.4(b)(3) of the Commission's Rules.[4] Accordingly, the unpublished reconsideration decision in Randolph, Vermont, et al., may not properly serve as precedent in this proceeding.

Apparently recognizing the unsoundness of their position concerning the scope and applicability of Section 1.4(b)(3) of the Rules, the Petitioners urge that the Commission not apply Section 1.4(b)(3) in such a fashion as to enforce the rule against the Petitioners. In this connection,

---

[4] It should also be noted that in its Report and Order in Randolph, Vermont, et al., the Policy and Rules Division not only upgraded the channel of a Randolph, Vermont, FM station from CLass A to Class C3 status, but also allotted a new Class A channel to Brandon, Vermont.

the Petitioners rely on Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985) in support of their argument that there has been "no prior notice of any change in policy" concerning the scope and applicability of Section 1.4(b)(3) of the Rules. The Petitioners further contend that the Commission should treat their Petition For Reconsideration "just as it has treated the petitions of innumerable similarly situated parties -- by considering it on the merits. Melody Music, Inc., v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965.)" Opposition to Motion To Strike at 5.

These contentions are devoid of any merit. In the first place, as shown above, in each of the three channel allotment cases cited by the Petitioners, the petition for reconsideration was dismissed without consideration as untimely. Indeed, in each of the three cases, the Commission emphasized that it lacks the statutory authority to entertain a late-filed petition for reconsideration. See, Knoxville, Tennessee, et al., supra, 78 FCC 2d at 1210; Clinton, North Carolina, et al., supra, 6 FCC Rcd at 5866; Randolph, Vermont, et al., supra, __ FCC Rcd __, slip op. at 2. Accordingly, these cases hardly form the basis for the Petitioners' unsupported and unsupportable conclusion that the Commission has accepted and considered the merits of "innumerable" petitions for reconsideration which were late-filed under Section 1.4(b)(3) of the Commission's Rules. In light of the foregoing, the Petitioners' argument based on Melody Music, Inc., v. FCC, supra, is pure sophistry.

Moreover, there is no merit whatsoever to the Petitioners' arguments based on Salzer v. FCC, supra. In Salzer, the Court of Appeals vacated the Commission's order dismissing certain low power television applications and remanded the case to the Commission for reinstatement of those applications. The Court held that, while the Commission was entitled to adopt a "letter perfect" standard of acceptability for low power television applications, nonetheless, the Commission had failed to provide adequate notice as to the timing and form of the necessary submissions to meet the "letter perfect" standard. The Court held that the Commission

> "... cannot reasonably expect applications to be letter-perfect, when, as here, its instructions for those applications are incomplete, ambiguous or improperly promulgated. The agency failed to give adequate notice as to how and when the preference information and the real party in interest and multiple application certifications should be submitted. Thus, it was not entitled to reject the applications of Salzer and her forty-four co-applicants on the ground that they failed to include these submissions."
>
> 778 F.2d at 875.

Salzer v. FCC is thus inapposite to the present proceeding. First, Salzer involved the substantive criteria that had to be met by applicants to assure acceptability for filing of low power television applications under a "letter perfect" standard; by contrast, all that is involved in the present proceeding is the issue of whether a petition for reconsideration was timely filed in connection with a channel allotment rulemaking proceeding. Furthermore, in Salzer, the Commission had failed to give adequate notice to the public as to how and when critical information must be submitted in connection with a low power television application. Hence, the Court of Appeals reaffirmed that "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected." 778 F.2d at 875 n. 26. In the instant proceeding, no rational basis exists for the suggestion that there has been any "change in policy" concerning the scope and applicability of Section 1.4(b)(3) of the Commission's Rules or that the rule itself is in any way not clear. In contrast to the circumstances faced by the appellants in Salzer, the Petitioners in this proceeding did not have to guess as to what would be required in order to make their filing with the Commission an acceptable submission. If, indeed, the Petitioners harbored any uncertainty as to whether the deadline for filing their reconsideration request was triggered by the release date of the Bureau's October 7, 1992 Report and Order in this case, or whether the deadline was triggered by publication of a summary of the Report and Order in the Federal Register, the Petitioners could have assured the timeliness of their filing by simply submitting their reconsideration request within 30 days of the date of release of the Report and Order. For reasons best known to the Petitioners themselves, they chose not to take this prudent course but opted, instead, to take the risk of filing their reconsideration request within 30 days of publication of a summary of the Report and Order in the Federal Register.

Finally, the Petitioners contend that, even if the Commission were to rule that their Petition For Reconsideration was indeed untimely, that fact would still not prohibit consideration of their Petition. In this regard, the Petitioners contend that the strong policy in favor of administrative finality may give way so as to allow a proceeding to be reopened if there has been "fraud" on the agency's processes. The Petitioners claim, in this connection, that they have argued in this proceeding that there has been an abuse of the Commission's processes. Opposition To Motion To Strike at 5.

These arguments border on the disingenuous. First, the Bureau's Report and Order in this proceeding expressly considered and rejected the alleged "merits" of the Petitioners' abuse of process claims -- claims which the Petitioners themselves recognized were based on materials that were "largely circumstantial". Second, the Petitioners fail to recognize that the Commission has consistently held that it lacks authority to extend or waive the statutory 30-day filing period for petitions for reconsideration that is specified in Section 405 of the Communications Act. See Albert D. Maizels, 20 FCC 2d 329 (1969); Metromedia, Inc., 56 FCC 2d 909, 909-10 (1975), reconsideration denied, 59 FCC 2d 1189 (1976); United Broadcasting Company of Florida, Inc., 61 FCC 2d 970, 972 (1976); Panola Broadcasting Co., 68 FCC 2d 533 (1978); Scripps-Howard Broadcasting Co., 69 FCC 2d 1477, 1478 (1978); American Broadcasting Companies, Inc. (KGO-TV), 86 FCC 2d 1 (1981); Commonwealth Telephone Company, 2 FCC Rcd 5299, 5301 (1989); Richardson Independent School District, 5 FCC Rcd 3135, 3136 (1990); Reuters, Ltd. v. FCC, 781 F.2d 946, 951-52 (D.C. Cir. 1986). This is so even if the petition for reconsideration is filed only one day late. Metromedia, Inc., supra; Panola Broadcasting Co., supra; Richardson Independent School District, supra. If the Petitioners were correct in their position, the mere fact that they had raised an abuse of process claim below would mean that the Commission would never be able to invoke the clear mandate of Section 405 of the Communications Act to dismiss an untimely petition for reconsideration. Such a result is not only absurd but also flies in the face of Section 405 of the Act.

## III. Conclusion

Notwithstanding the Petitioners' meritless suggestions to the contrary, the mandate of Section 1.4(b)(3) of the Commission's Rules is clear and unmistakable. An administrative agency is under an obligation to follow its own rules and procedures. See American Federation Of Government Employees v. Federal Labor Relations Authority, 777 F.2d 751, 759 (D.C. Cir. 1985); National Conservative Political Action Committee v. Federal Election Commission, 626 F.2d 953, 959 (D.C. Cir. 1980; see, also, United States v. Nixon, 418 U.S. 683, 694–96 (1974); Lucas v. Hodgess, 730 F.2d 1493, 1504 n. 20 (D.C. Cir. 1984). See, generally, 2 K.Davis, Administrative Law Treatise, § 7:21 at 98–99 (1979). The Commission must, therefore, enforce Section 1.4(b)(3) in accordance with its terms and must therefore dismiss the Petitioners' Petition For Reconsideration without consideration as late–filed.

Respectfully submitted,

SCHUYLER H. MARTIN

By: _____
Irving Gastfreund

Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 682–3526

His Attorneys

November 25, 1992

**CERTIFICATE OF SERVICE**

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 25th day of November, 1992, sent copies of the foregoing "Reply To Opposition To Motion To Strike" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

Roy J. Stewart, Esq. *
Chief, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8322
Washington, D.C. 20554

Michael J. Ruger, Esq.*
Chief, Allocations
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8322
Washington, D.C. 20554

John J. McVeigh, Esq.*
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170
Counsel to Petitioners

Shelton M. Binstock, Esq.
1140 Connecticut Avenue, N.W.
Suite 703
Washington, D.C. 20036
Counsel to Danjon, Inc.

Mary Odder

*/ Via Hand-Delivery

DOC #12077564